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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JACK MILLER,

Plaintiff and Appellant,

v.

AURORA LOAN SERVICES LLC et al.,

Defendants and Respondents.

G050110

(Super. Ct. No. RIC1206335)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,
Daniel A. Ottolia, Judge. Affirmed.

Bergman & Gutierrez, Penelope P. Bergman and Deborah P. Gutierrez for
Plaintiff and Appellant.

Akerman Senterfitt, Justin D. Balser, Jamie Z. Roth; Akerman and Bryan
Leifer for Defendants and Respondents.

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INTRODUCTION

Plaintiff Jack Miller appeals after the trial court sustained Aurora Loan Services LLC (Aurora) and Nationstar Mortgage LLC's (Nationstar) (collectively, defendants) demurrer to his second amended complaint without leave to amend. Miller argues he pleaded sufficient facts to state causes of action for cancellation of documents (including an assignment of the trust deed he executed in connection with his ownership of real property), violation of Business and Professions Code section 17200 et seq., and declaratory relief.

We affirm. As discussed in detail *post*, the second amended complaint failed to allege facts sufficient to state a cause of action. Miller does not contend the trial court should have granted him leave to further amend.

SUMMARY OF THE ALLEGATIONS

“In reviewing the order sustaining the demurrer, we accept the factual allegations of the [operative c]omplaint as true. [Citation.] We also accept as true facts appearing in exhibits attached to the complaint. [Citations.] If the facts expressly alleged in the complaint conflict with an exhibit, the contents of the exhibit take precedence.” (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 55-56.) We summarize the allegations of Miller's operative complaint—the second amended complaint—as follows.

Miller owned real property located in Riverside (the property). On January 17, 2007, he executed a promissory note in the amount of \$760,000 in favor of Guaranteed Rate, Inc. The promissory note was secured by a deed of trust that named Miller as the borrower; Guaranteed Rate, Inc., as the lender; Pacific West Escrow as the trustee; and Mortgage Electronic Registration Systems, Inc. (MERS), as both the nominee for the lender and its successors and assigns, and also as “beneficiary under this Security Instrument.”

On or before May 11, 2007, “the Loan” was sold to Structured Assets Securities Corporation, which Miller believed was a non-MERS member, and was securitized into the Lehman XS Trust 2007-6. According to MERS’s policies and procedures, “when a mortgage loan is sold to a non-MERS member, an assignment of mortgage is required to transfer the mortgage lien from MERS to the non-MERS member. Such an assignment is subsequently recorded in the land records providing notice as to the termination of MERS’ role as mortgagee.’”

On September 12, 2008, Susan Smothers, in the capacity of assistant secretary of MERS, executed a substitution of trustee substituting Cal-Western Reconveyance Corporation (Cal-Western) as trustee for the trust deed; the substitution of trustee was recorded on November 4. On September 25, 2008, Cal-Western recorded a notice of default.

On September 30, 2008, Jo Ann Rein, as vice-president of MERS, executed a document entitled “Corporate Assignment of Deed of Trust” (the assignment of the trust deed), stating that for value received, MERS transferred to Aurora all beneficial interest under the trust deed and the promissory note. The assignment of the trust deed was recorded on November 10.

On April 20, 2011, Cal-Western executed a document entitled “Trustee’s Deed upon Sale,” “purporting to transfer the Property to Aurora.” The Trustee’s Deed upon Sale was executed by Smothers, who was identified on that document as “A.V.P.” of Cal-Western. Miller “was subsequently evicted from his Property.”

On August 4, 2011, Miller “was informed by counsel for Aurora that the owner of the debt is Wilmington Trust Company, in trust for, Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-6 at the time [Miller]’s Property was sold; not Aurora.” MERS’s records, as of January 30, 2012, “indicate[d] that ALS-Wilmington Trust Co. is the ‘investor’ of the Loan.”

On June 15, 2012, Aurora sent Miller correspondence notifying him that “the servicing rights of the Loan were being transferred to Nationstar on July 1, 2012.” On August 28, 2012, defendants’ counsel represented that Aurora “had transferred title to the Property to Nationstar.”

PROCEDURAL HISTORY

Miller filed a second amended complaint against defendants, containing claims for (1) “Cancellation of Instruments Cal. Civ. Code Section 3412,” (2) violation of Business and Professions Code section 17200 et seq., and (3) declaratory relief. Defendants demurred to each of the causes of action, on the ground it failed to state facts sufficient to constitute a cause of action.

The trial court sustained the demurrer to the second amended complaint without leave to amend. The court’s signed order further stated, “[t]he complaint is dismissed with prejudice.” Miller filed a notice of appeal, stating that he appealed from the court’s order sustaining the demurrer without leave to amend and dismissing the complaint.¹ The court entered a judgment of dismissal in favor of defendants and against Miller on the second amended complaint.

DISCUSSION

I.

CALIFORNIA NONJUDICIAL FORECLOSURE LAW AND THE STANDARD OF REVIEW

Miller’s lawsuit involves claims arising out of the nonjudicial foreclosure proceedings and sale of the property that occurred following Miller’s default.

¹ Code of Civil Procedure section 581d provides in part: “All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case.”

“California’s nonjudicial foreclosure scheme is set forth in Civil Code sections 2924 through 2924k, which ‘provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.’ [Citation.] ‘These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.’ [Citation.] ‘The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.’ [Citation.] ‘Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.’ [Citations.]” (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 (*Gomes*).)

“We independently review a ruling on a demurrer to determine whether the pleading alleges facts sufficient to state a cause of action. [Citation.] In so doing, ‘[t]he complaint must be liberally construed and survives a general demurrer insofar as it states, however inartfully, facts disclosing some right to relief.’ [Citation.] [¶] ‘On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]’” (*Lueras v. BAC Home Loans Servicing, LP, supra*, 221 Cal.App.4th at p. 61.)

II.

MILLER FAILED TO PLEAD SUFFICIENT FACTS TO STATE A CLAIM FOR CANCELLATION OF INSTRUMENTS.

In his first cause of action, Miller alleged the assignment of the trust deed, notice of default, notice of sale, and Trustee's Deed upon Sale are void and "should be cancelled" because the assignment of the trust deed from MERS to Aurora was void. Miller's claim is based on Civil Code section 3412, which provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." For the reasons we explain, Miller failed to plead sufficient facts showing that the assignment of the trust deed or any of the subsequent documents were void or voidable. Even if he had alleged sufficient facts, he failed to plead facts showing how he was prejudiced.

In *Gomes, supra*, 192 Cal.App.4th at page 1154, the appellate court held, "[n]othing in the statutory provisions establishing the nonjudicial foreclosure process" supports "a right to bring a court action to determine whether the owner of [a promissory note] has authorized its nominee to initiate the foreclosure process." The court explained that "to impose the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure . . . would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy." (*Gomes, supra*, 192 Cal.App.4th at p. 1154, fn. 5)

In his opening brief, Miller asserts that his cause of action for cancellation of instruments "is not about *authority* to conduct a foreclosure sale" but about misconduct in the form of defendants "creating and filing *false* instruments in order to effectuate a foreclosure sale, whether such sale was authorized or not." The second amended complaint alleged the assignment of the trust deed was *false* and, therefore, it, and subsequent instruments, must be cancelled because the "owner of the debt" was

Wilmington Trust Company, in trust for Lehman XS TrustMortgage Pass-Through Certificates, Series 2007-6. It further alleged that, consequently, the trust deed could not have been assigned to Aurora from MERS.

There are no facts alleged showing that the assignment of the trust deed was false or that MERS or any other party engaged in misconduct. As explained in *Gomes, supra*, 192 Cal.App.4th at page 1151, “‘MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members’ interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. *The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.*’ [Citation.] ‘A side effect of the MERS system is that a transfer of an interest in a mortgage loan between two MERS members is unknown to those outside the MERS system.’ [Citation.]” (Italics added.)

Here, the second amended complaint alleged Wilmington Trust Company, in trust for Lehman XS TrustMortgage Pass-Through Certificates, Series 2007-6, succeeded Guaranteed Rate, Inc.’s interests as the lender and thus retained the promissory note and servicing rights. No allegations suggest the lender’s succession in any way affected the trust deed’s provisions that MERS act as the nominee for the lender *and the lender’s successors and assigns*. That MERS violated any of its own internal procedures or policies in its handling of the succession of Guaranteed Rate, Inc.’s interests as the lender does not affect the validity of the assignment of the trust deed. Miller does not cite any legal authority stating otherwise.

Miller further asserts that the assignment of the trust deed was invalid because it was executed by Aurora (not MERS) to transfer an interest in the property to Aurora. The second amended complaint alleged that on September 30, 2008, Rein, *as vice-president of MERS*, executed the assignment of the trust deed, stating that for value received, MERS transferred to Aurora all beneficial interest under the trust deed and promissory note. The second amended complaint further alleged, however, Rein worked for Aurora, not MERS. There is no allegation that MERS did not authorize Rein, or Aurora for that matter, to act on its behalf in effectuating the assignment of the trust deed. Miller has not cited any legal authority, and we have found none, prohibiting an agent of MERS to effect an assignment of a trust deed for which MERS served as the nominee and beneficiary.

Furthermore, nothing in the trust deed prohibited MERS's assignment of "all beneficial interest" and "all rights accrued or to accrue" under the trust deed to Aurora. (See *Robinson v. Countrywide Home Loans, Inc.* (2011) 199 Cal.App.4th 42, 46 [nonjudicial foreclosure statutory scheme "does not provide for a preemptive suit challenging standing"]; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 271 ["the allegation that MERS was merely a nominee is insufficient to demonstrate that MERS lacked authority to make a valid assignment of the note on behalf of the original lender"]; *Gomes, supra*, 192 Cal.App.4th at pp. 1154-1157 [the plaintiff failed to identify legal basis for claim to determine whether MERS had authority to initiate a foreclosure proceeding].) Miller has not cited any legal authority, and we have found none, which would preclude such an assignment.

In any event, California Courts of Appeal have held that even in postforeclosure actions a borrower lacks standing to challenge an assignment absent a showing of prejudice. (See *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 86; *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507; *Fontenot v. Wells Fargo Bank, N.A., supra*, 198 Cal.App.4th at

p. 271.) The appellate court in *Siliga v. Mortgage Electronic Registration Systems, Inc.*, *supra*, 219 Cal.App.4th at page 85, stated: “[T]he Siligas fail to allege any facts showing that they suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process. The Siligas do not dispute that they are in default under the note. The assignment of the deed of trust and the note did not change the Siligas’ obligations under the note, and there is no reason to believe that Accredited as the original lender would have refrained from foreclosure in these circumstances. Absent any prejudice, the Siligas have no standing to complain about any alleged lack of authority or defective assignment.”

Similarly, here, Miller did not allege facts showing he had suffered prejudice as a result of any alleged lack of authority of the parties participating in the foreclosure process, by way of a void assignment or otherwise. He failed to allege he was not in default under the promissory note that he had executed. Neither the assignment of the trust deed, nor any of the other documents that is the subject of Miller’s claim for cancellation of instruments, changed his obligations under the promissory note; there is no basis for concluding that had the assignment of the trust deed not occurred, the property would not have been foreclosed upon. The trial court, thus, did not err by sustaining defendants’ demurrer as to the cancellation of instruments claim.

III.

MILLER DID NOT STATE A CAUSE OF ACTION FOR VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ.

In the second amended complaint, Miller alleged defendants engaged in unfair, unlawful, and fraudulent business practices in violation of Business and Professions Code section 17200 et seq. Miller alleged defendants engaged in fraudulent, unfair, and unlawful business practices (in violation of Penal Code sections 115 and 532f, subdivision (a)(4)) by filing or causing to be filed the assignment of the trust deed with

the Riverside County Recorder's Office "in connection with [Miller]'s Mortgage Loan transaction with knowledge that the Assignment contained deliberate misstatements and misrepresentations, including, *inter alia*, that Aurora had been assigned [Miller]'s Note and Mortgage."

Miller asserts his claim for cancellation of instruments serves as a predicate for his violation of Business and Professions Code section 17200 et seq. claim. But, as discussed *ante*, Miller failed to allege sufficient facts to show that defendants filed or caused to be filed a false assignment of the trust deed. As the falsity of the information contained in the assignment of the trust deed is essential to Miller's cause of action for violation of Business and Professions Code section 17200 et seq., defendants' demurrer to that cause of action was properly sustained.

IV.

MILLER FAILED TO STATE A CLAIM FOR DECLARATORY RELIEF.

Miller's cause of action for declaratory relief sought a judicial declaration "determining whether Aurora and/or Nationstar obtained any interest in the Property pursuant to any valid assignment or transfer other than the purported Assignment recorded on the Property." In his opening brief, Miller asserts, "[t]o the extent [Miller] can show that the Assignment is false and subject to cancellation, a fact-specific, concrete basis arises warranting an adjudication of the actual bona fide ownership dispute between the parties. [Miller]'s plea for declaratory relief follows [Miller]'s claim for cancellation of the invalid instruments. Once the invalid instruments are cancelled, declaratory relief will serve to address the next questions raised by the false instrument, including whether Aurora or Nationstar obtained *any* rights to [Miller]'s Loan or Property by any other means and whether Aurora was authorized to sell [Miller]'s Property. [¶] In sum, [Miller] has adequately pled specific facts alleging an actual controversy as to whether Aurora was ever validly assigned [Miller]'s Loan."

As Miller's declaratory relief claim is duplicative of and entirely dependent on the viability of his cancellation of instruments claim, his claim for declaratory relief fails because, as discussed *ante*, he failed to state facts sufficient to support his cancellation of instruments claim. The trial court properly sustained defendants' demurrer to that claim.

DISPOSITION

The judgment is affirmed. Respondents shall recover the costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.